

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTHA QUEZADA
Claimant

VS.

HAYES COMPANY
Self-Insured Respondent

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Docket No. 1,018,162

ORDER

Respondent requests review of the August 4, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

ISSUES

This is the second appearance of this case before the Appeals Board. In the first preliminary hearing, the ALJ¹ rejected claimant's request for benefits as he concluded there was insufficient evidence of causation.²

Thereafter, a second preliminary hearing was held on May 24, 2005 by ALJ Klein, who had assumed the permanent position for the Division. Following that hearing an Order was issued granting claimant's request for benefits. The ALJ concluded "Dr. Stein is unable to come to a conclusion about causation, other than to say that if the [c]laimant is testifying truthfully, the injury was aggravated by the work. There appears to be a language barrier that confuses the record. I find that the [c]laimant more likely than not aggravated her condition as a result of her work with the [r]espondent."³

The respondent has appealed this most recent preliminary hearing Order contending there is "no credible evidence that the work she [claimant] performed. . .aggravated her preexisting condition. Her [claimant's] manner of injury has changed and

¹ Special ALJ Lee Kinch heard and decided this preliminary request on November 4, 2004. That order was appealed to the Board and affirmed on March 17, 2005.

² ALJ Order (Nov. 4, 2004).

³ ALJ Order (Aug. 4, 2005).

now her theory is changing.”⁴ Accordingly, respondent requests the Board reverse the ALJ’s preliminary hearing Order.

The claimant argues that the ALJ was correct in finding her physical complaints were attributable to her work with respondent. Accordingly claimant requests the Board affirm the ALJ’s preliminary hearing order.

As in the previous appeal, the only issue before the Board is whether claimant has established her present back complaints and need for treatment are from an accident that arose out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties’ arguments, the Board finds and concludes the preliminary hearing order should be affirmed.

The facts surrounding the claimant’s claim are, for the most part, undisputed and were summarized in the Board’s March 17, 2005 Order as follows:

The parties agree claimant injured her back on June 2, 2003, while working for respondent. The parties also agree claimant received medical treatment for her back injury from a Dr. Davis. On July 11, 2003, Dr. Davis released claimant from treatment, noting her symptoms had resolved.

But due to a seasonal layoff and a hysterectomy, claimant did not return to work for respondent until December 15, 2003. Claimant resumed her regular work doing housekeeping duties for respondent. By May 2004, claimant was experiencing numbness in her right leg. Claimant reported her symptoms to her supervisor and the company nurse. According to claimant, her supervisor suggested claimant use her own insurance to seek medical treatment.

On May 5, 2004, claimant sought medical treatment from her personal physician, Dr. H. O. Fernandez. The doctor ordered a MRI and recommended claimant consult a surgeon. When claimant presented respondent with papers from Dr. Fernandez, respondent sent her home. The record is not clear if claimant worked for respondent after that date.

The parties agreed claimant should see Dr. Paul S. Stein to be evaluated for purposes of this claim. The doctor saw claimant on September 7, 2004, at which time claimant noted she was having pain in the right lumbar area with radiation down the back of the right leg to the foot. The doctor noted claimant’s pain was a pinching-type pain that was initiated by walking and aggravated by standing, walking, and driving.

⁴ Respondent’s Brief at 8 (filed Aug. 22, 2005).

Dr. Stein reviewed, among other doctors' records, Dr. Fernandez's medical records from May 5, 2004, which indicated claimant had numbness in her right leg when walking "x 1 week."⁵ Dr. Stein also reviewed the radiology report from the May 17, 2004 MRI that Dr. Fernandez had ordered. The MRI showed mild lower lumbar degenerative disease and a far posterolateral right disk bulge at L5-S1, which was narrowing the neural foramen.

After examining claimant and reviewing the various medical records that had been provided, Dr. Stein concluded he could not relate claimant's present problems to her June 2003 back injury at work. The doctor did not provide any opinion whether claimant's present back problems were related to the work she performed for respondent after her December 2003 return.⁶

When the evidence was presented to Special ALJ Kinch, he concluded there was an insufficiency of evidence to support claimant's claim that her back symptoms and her present need for medical treatment were due to an accidental injury that arose out of and in the course of her employment with respondent. Based upon the evidence presented up to that juncture of the claim, the Board affirmed the Special ALJ's finding.

Thereafter, additional evidence was offered in the form of deposition testimony from Sandra Mae LeSage, Luz Unruh and additional testimony from claimant. The claimant also offered additional medical records from Dr. Paul Stein, the physician who has examined claimant and who commented (albeit inconclusively) on the causal link between the claimant's physical complaints and her work activities.

After considering the evidence, ALJ Klein indicated he was persuaded that claimant's work activities aggravated her condition.⁷ And he granted claimant's request for medical treatment.

Respondent contends the ALJ erred and requests the Board reverse the ALJ's opinion. In support of this request, respondent points to the deposition testimony of Luz Unruh, claimant's supervisor and Sandy LeSage. Ms. LeSage asserts claimant made her first complaint of back pain no earlier than April 29, 2004. Respondent argues this is wholly inconsistent with claimant's contention that she repeatedly told her supervisor of her ongoing back problems. Ms. Unruh, also testified that she recalled claimant complaining of hip problems sometime between December 15, 2003 to July 2004. Finally, as noted by the ALJ, Dr. Stein's opinions are largely not helpful on the issue of causation.

⁵ P.H. Trans., Resp. Ex. 1 at 2.

⁶ Board Order (Mar. 17, 2005) at 2-3.

⁷ ALJ Order (Aug. 4, 2005).

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁹

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.¹⁰

After considering all the evidence offered by the parties, the Board finds the ALJ’s preliminary Order should not be disturbed. As is often the case, determination on the issue of causation turns upon credibility. Unlike the respondent, the Board does not find that claimant’s theory of her injury has altered. This claim was originally pled as an acute injury followed by a series of aggravations. While her injury and her ongoing symptoms may well all stem from her original injury, she also has alleged and indeed the evidence substantiates that her ongoing work activities aggravated her condition up until July 2004 when she ceased work. Accordingly, the ALJ’s preliminary hearing Order is affirmed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Thomas Klein dated August 4, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Terry J. Torline, Attorney for Self-Insured Respondent
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁸ K.S.A. 44-501(a) (Furse 1993).

⁹ K.S.A. 44-508(g) (Furse 1993).

¹⁰ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).